

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA  
BLUEFIELD DIVISION**

<b>ROBERT NEUNZ,</b>	)	
	)	
<b>Plaintiff,</b>	)	
<b>v.</b>	)	<b>Civil Action No. 1:13-13248</b>
	)	
<b>MCDOWELL COUNTY</b>	)	
<b>CORRECTIONAL CENTER, <i>et al.</i>,</b>	)	
	)	
<b>Defendants.</b>	)	

**PROPOSED FINDINGS AND RECOMMENDATION**

Pending before the Court is Plaintiff's Application to Proceed Without Prepayment of Fees. (Document No. 4.) The undersigned has determined that Plaintiff did not exhaust administrative remedies prior to initiating this matter and therefore respectfully recommends that Plaintiff's Application to Proceed Without Prepayment of Fees be denied and this matter be dismissed and removed from the District Court's docket.

**FACTUAL AND PROCEDURAL BACK GROUND**

On June 4, 2013, Plaintiff, acting *pro se*<sup>1</sup> and incarcerated at Stevens Correctional Center, located in Welch, West Virginia, filed his Complaint in this matter claiming entitlement to relief pursuant to 42 U.S.C. § 1983. (Document No. 1.) Plaintiff names the following as Defendants: (1) McDowell County Correctional Center; (2) Debbie Cochran, Unit Manager; (3) Dennis Dingus, Warden. (*Id.*) Plaintiff first alleges that Defendants are failing to place him in a special management facility. (*Id.*, pp. 4 - 5.) Plaintiff explains that "[o]n May 6, 2013, Unit Manager Debbie Cochran called me to her office and stated that I would have to have inmate or staff witnesses about the threats that were made against me." (*Id.*, p. 4.) Plaintiff alleges that "State and Federal laws state that if an

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<sup>1</sup> Because Plaintiff is acting *pro se*, the documents which he has filed in this case are held to a less stringent standard than if they were prepared by a lawyer, and therefore they are construed liberally. *See Haines v. Kerner*, 404 U.S. 519, 520-21, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972).

inmate asks for special management/PC protection, the inmate must be moved to a special management facility as soon as possible.” (*Id.*) Plaintiff, however, states that “[a]s of May 28, 2013, I’m still being housed in the McDowell County Correctional Center.” (*Id.*, p. 5.) Plaintiff states that he “again requested special management on May 28, 2013.” (*Id.*) Finally, Plaintiff attaches “a list of many health and safety violations that needs to be addressed as well.” (*Id.*) Specifically, Plaintiff alleges the following “health and safety violations”: (1) “no regulator on hot water;” (2) “no sprinkler system in the facility;” (3) “no fire extinguisher in cells;” (4) “no officer posted inside living dorms;” (5) “food service does not have a transport license to transport food from one facility to another to feed inmate population but they are doing so;” (6) “wire mesh on windows with exposed sharp edges that can cause bodily harm;” (7) “showers on second floor run into the closet drain;” (8) “extension cords running on the floors causing tripping hazards;” (9) “law library inadequate legal forms and other items are not provided;” (10) “unit manager and office staff threaten inmates with punishment if they threaten to file a lawsuit or legal action;” (11) “windows all floors are covered with plastic;” (12) “square footage not enough for the amount of inmate housed here;” (13) “sewage leaks from 3<sup>rd</sup> floor to all other floors;” (14) “no air circulation;” (15) “not enough square footage on the rec yard for the amount of inmates housed here;” and (16) “mildew on all shower walls.” (*Id.*, pp. 9 - 10.) As relief, Plaintiff requests to be “moved to a special management facility”<sup>2</sup> and “an investigation into the health and safety violations.” (*Id.*, p. 5.)

### **DISCUSSION**

The Prison Litigation Reform Act, 42 U.S.C. § 1997e(a)(1996), requires that inmates exhaust

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<sup>2</sup> A prisoner has no constitutional right to be confined in any particular institution and prison officials have great discretion in decisions on the transfer of prisoners. *Meachum v. Fano*, 427 U.S. 215, 228 (1976). Just as a sentencing court may not order a convicted defendant housed in a particular facility, this Court lacks the authority to order Plaintiff to be transferred to a different facility. *See United States v. Williams*, 65 F.3d 301, 307 (2nd Cir. 1995) (“A sentencing court has no authority to order that a convicted defendant be confined in a particular facility, much less placed in a particular treatment program; those decisions are within the sole discretion of the Bureau of Prisons.”)

available administrative remedies prior to filing civil actions though the administrative process may not afford them the relief they might obtain through civil proceedings.<sup>3</sup> Woodford v. Ngo, 548 U.S. 81, 126 S.Ct. 2378, 2382-83, 165 L.Ed.2d 368 (2006); Porter v. Nussle, 534 U.S. 516, 122 S.Ct. 983, 152 L.Ed.2d 12 (2002)(The Prison Litigation Reform Act's exhaustion requirement applies to all inmate suits about prison life whether they involve general circumstances or particular episodes and whether they allege excessive force or some other wrong.); Booth v. Churner, 532 U.S. 731, 121 S.Ct. 1819, 1820, 149 L.Ed.2d 958 (2001)(“Under 42 U.S.C. § 1997e(a), an inmate seeking only money damages must complete any prison administrative process capable of addressing the inmate's complaint and providing some form of relief, even if the process does not make specific provision for monetary relief.”). Exhaustion of administrative remedies is also required when injunctive relief is requested. Goist v. U.S. Bureau of Prisons, 2002 WL 32079467, \*4, fn.1 (D.S.C. Sep 25, 2002), *aff'd*, 54 Fed.Appx. 159 (4<sup>th</sup> Cir. 2003), *cert. denied*, 538 U.S. 1047, 123 S.Ct. 2111, 155 L.Ed.2d 1088 (2003). “[T]here is no futility exception to the PLRA's exhaustion requirement.” Massey v. Helman, 196 F.3d 727, 733 (7<sup>th</sup> Cir. 1999). But the plain language of the statute requires that only “available” administrative remedies be exhausted. A grievance procedure is not “available” if prison officials prevent an inmate from using it. Dale v. Lappin, 376 F.3d 652, 656 (7<sup>th</sup> Cir. 2004); Mitchell v. Horn, 318 F.3d 523, 529 (3<sup>d</sup> Cir. 2003)(inmate lacked available administrative remedies for exhaustion purposes where inmate was unable to file a grievance because prison officials refused to provide him with the necessary grievance forms); Miller v. Norris, 247 F.3d 736, 740 (8<sup>th</sup> Cir. 2001)(allegations that prison officials failed to respond to his written requests for grievance forms were sufficient to raise an inference that inmate had exhausted his available administrative remedies.)

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<sup>3</sup> 42 U.S.C. § 1997e(a) provides as follows:

No action shall be brought with respect to prison conditions under section 1983 of this title or any other federal law, by a prisoner confined in any jail, prison, or other correction facility until such administrative remedies as are available are exhausted.

If an inmate exhausts administrative remedies with respect to some, but not all, of the claims he raises in a Section 1983, Bivens or FTCA action, the Court must dismiss the unexhausted claims and proceed with the exhausted ones. See Jones v. Bock, 549 U.S. 199, 127 S.Ct. 910, 913, 166 L.Ed.2d 798 (2007)(“The PLRA does not require dismissal of the entire complaint when a prisoner has failed to exhaust some, but not all, of the claims included in the complaint. \* \* \* If a complaint contains both good and bad claims, the court proceeds with the good and leaves the bad.”) It appears to be the majority view as well that exhausting administrative remedies after a Complaint is filed will not save a case from dismissal. See Neal v. Goord, 267 F.3d 116, 121-22 (2d Cir. 2001)(*overruled on other grounds*), a Section 1983 action, citing numerous cases. The rationale is pragmatic. As the Court stated in Neal, allowing prisoner suits to proceed, so long as the inmate eventually fulfills the exhaustion requirement, undermines Congress’ directive to pursue administrative remedies prior to filing a complaint in federal court. Moreover, if during the pendency of a suit, the administrative process were to produce results benefitting plaintiff, the federal court would have wasted its resources adjudicating claims that could have been resolved within the prison grievance system at the outset. Neal, 267 F.3d at 123. In Freeman v. Francis, 196 F.3d 641, 645 (6th Cir. 1999), the Court stated: “The plain language of the statute [§ 1997e(a)] makes exhaustion a precondition to filing an action in federal Court.. . .The prisoner, therefore, may not exhaust administrative remedies during the pendency of the federal suit.” Thus, the PLRA requires that available administrative remedies must be exhausted before the filing of a suit in Federal Court. It is further clear that the PLRA does not require that an inmate allege or demonstrate that he has exhausted his administrative remedies. See Jones v. Bock, *supra*; Anderson v. XYZ Correctional Health Services, 407 F.3d 674, 677 (4<sup>th</sup> Cir. 2005). Failure to exhaust administrative remedies is an affirmative defense. Prison officials have the burden of proving that the inmate had available remedies which he did not exhaust. See Dale v. Lappin, 376 F.3d 652, 655 (7<sup>th</sup> Cir. 2004)(“Although exhaustion of administrative remedies is a precondition to a federal prisoner filing a Bivens suit, [citations omitted] failure to exhaust is an

affirmative defense that the defendants have the burden of pleading and proving.” (Citations omitted)) The Court is not precluded, however, from considering at the outset whether an inmate has exhausted administrative remedies. The Fourth Circuit stated in Anderson, 470 F.3d at 683, as follows:

[A]n inmate’s failure to exhaust administrative remedies is an affirmative defense to be pleaded and proven by the defendant. That exhaustion is an affirmative defense, however, does not preclude the district court from dismissing a complaint where the failure to exhaust is apparent from the face of the complaint, nor does it preclude the district court from inquiring on its own motion into whether the inmate exhausted all administrative remedies.

The West Virginia Division of Corrections’ Policy Directive 335.00 establishes procedures whereby state inmates may seek review of complaints which relate to any aspect of their imprisonment. Within 15 days after the circumstances occurred which are the subject of the inmate’s complaints, the inmate must submit a G-1 Grievance Form to the Unit Manager. The Unit Manager must respond to the inmate’s Grievance within five business days. If the Unit Manager’s response was unfavorable, the inmate may appeal within five working days to the Warden/Administrator by filing a G-2 Grievance Form. The Warden/Administrator must respond to the appeal, in writing, within five working days. If the Warden/Administrator, in his/her discretion, determines that an investigation is warranted, a final response shall be made to the inmate within 30 working days. If the Warden/Administrator’s response was unfavorable, the inmate may appeal within five working days to the Commissioner/designee of the Division of Corrections. The Commissioner must respond to the appeal within ten working days. The administrative process is exhausted when the Commissioner responds to the inmate’s final appeal. The entire process takes about 60 days to complete.

In his Complaint, Plaintiff acknowledges that he did not fully exhaust his administrative remedies. (Document No. 1, p. 3.) Plaintiff states that he “filed a request to Unit Management and

then filed a grievance.” (*Id.*) Plaintiff complains that “nothing was done about the situation.” (*Id.*) If Plaintiff was dissatisfied with the Warden’s response to his grievance, Plaintiff should have filed an appeal with the Commissioner of the Division of Corrections. Instead, Plaintiff filed his Complaint in this Court without fully exhausting his administrative remedies. The undersigned, therefore, recommends that Plaintiff’s Complaint be dismissed in view of his failure to exhaust the administrative remedies provided under the West Virginia Division of Corrections’ Policy Directive 335.00 prior to filing his Complaint.

### **PROPOSAL AND RECOMMENDATION**

Based upon the foregoing, it is therefore respectfully **PROPOSED** that the District Court confirm and accept the foregoing factual findings and legal conclusions and **RECOMMENDED** that the District Court **DENY** Plaintiff’s Application to Proceeding Without Prepayment of Fees (Document No. 4.), **DISMISS** Plaintiff’s Complaint (Document No. 1.) and remove this matter from the Court’s docket.

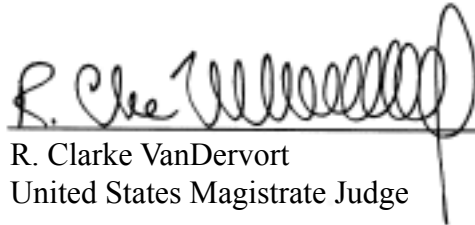
Plaintiff is hereby notified that this “Proposed Findings and Recommendation” is hereby **FILED**, and a copy will be submitted to the Honorable United States District Judge David A. Faber. Pursuant to the provisions of Title 28, United States Code, Section 636(b)(1)(B), and Rule 6(e) and 72(b), Federal Rules of Civil Procedure, the Plaintiff shall have seventeen (17) days (fourteen days, filing of objections and three days, mailing/service) from the date of filing of this Findings and Recommendation within which to file with the Clerk of this Court specific written objections identifying the portions of the Findings and Recommendation to which objection is made and the basis of such objection. Extension of this time period may be granted for good cause.

Failure to file written objections as set forth above shall constitute a waiver of *de novo* review

by the District Court and a waiver of appellate review by the Circuit Court of Appeals. Snyder v. Ridenour, 889 F.2d 1363, 1366 (4th Cir. 1989); Thomas v. Arn, 474 U.S. 140, 155 (1985); Wright v. Collins, 766 F.2d 841, 846 (4th Cir. 1985); United States v. Schronce, 727 F.2d 91, 94 (4th Cir. 1984). Copies of such objections shall be served on opposing parties, District Judge Faber and this Magistrate Judge.

The Clerk is requested to send a copy of this Proposed Findings and Recommendation to Plaintiff, who is acting *pro se*, and transmit a copy to counsel of record.

Date: September 10, 2013.



R. Clarke VanDervort  
United States Magistrate Judge